

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

TDS Metrocom, LLC)	
-vs-)	
Illinois Bell Telephone Company)	
)	03-0553
Complaint concerning imposition of)	
unreasonable and anti-competitive)	
termination charges by Illinois Bell)	
Company.)	

**REPLY BRIEF OF THE STAFF OF
THE ILLINOIS COMMERCE COMMISSION**

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The Staff of the Illinois Commerce Commission (“Staff”), by and through its counsel, and pursuant to Section 200.800 of the Commission’s Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Reply Brief in the above-captioned matter. Staff reiterates and incorporates by reference the factual and legal arguments it made in its Initial Brief. Staff does not intend to revisit in detail the issues it addressed in its Initial Brief. Staff will, however, reply to some of the points that both TDS and SBC make in their respective Initial Briefs.

I. Staff Reply To TDS

As Staff noted in its Initial Brief, this proceeding was initiated pursuant to a complaint (“Complaint”) filed by TDS Metrocom, LLC (“TDS”) against Illinois Bell Telephone Company (“SBC” or “SBC Illinois”) alleging that certain SBC termination liability provisions contained in long-term contracts are “unjust and unreasonable” and “anti-competitive.” Complaint, at 3, 19. Subsequent to TDS filing the instant Complaint, SBC revised its termination liability policies for all of their long-term contracts, except for

those products specifically addressed by the Commission in its ASCENT Order. The SBC revised policies capped the percentage by which SBC would enforce its tariffed and contracted term plans by the following: (1) for Centrex Services, 25% of the customer's remaining obligation; (2) for Usage Services, 35% of the customer's remaining obligation; and (3) Transport and Other services, 50% of the customer's remaining obligation.¹ SBC Ill. Ex. 1.0 (Gillespie), at 10-11.

TDS acknowledges that "SBC's revised policies represent an improvement over those in effect at the time the Complaint was filed." TDS Initial Brief, at 2. For TDS, however, the revised SBC termination liability policies, although an improvement, "are still excessive, unreasonable and anticompetitive and at odds with the principles articulated by the Commission in the *ASCENT* Order."² *Id.*

TDS, accordingly, requests, for relief, that the Commission order SBC to do the following:

(1) SBC Illinois should be directed to immediately replace all contractual and tariffed termination liability provisions that require the customer to pay all or a portion of the customer's remaining minimum annual revenue commitment amount for the duration of the contract, with provisions calculating the customer's termination liability as the difference between the discount the customer received during its term of service and the discount the customer would have received had it initially entered into a contract or tariffed plan with a term equal to the customer's actual term of service. (Complaint, ¶40(b)-(c); TDS Metrocom Ex. 1.5, pp. 7-8)

(2) Alternatively, if the Commission (the *ASCENT* Order notwithstanding) finds acceptable the form of termination liability provision used by SBC Illinois (*i.e.*, a stated percentage of the customer's remaining revenue obligation under the contract or tariffed plan), the Commission should

¹ On March 19, 2004, SBC filed with the Commission, letter Advice No.: IL-04-93, which implemented the SBC revised early termination liability policies for all term agreements.

² *Order on Rehearing*, Association of Communication Enterprises f/k/a Telecommunications Resellers Association vs. Ameritech Illinois, Complaint against enforcement of unjust and anti-competitive termination penalties in tariffs and contracts for Value-Link service and for modification of Value-Link tariffs and contracts, ICC Docket No. 00-0024 (Feb. 20, 2004) ("*ASCENT Order*" or "*ASCENT*").

nonetheless find that the percentages adopted by SBC in its revised termination liability policies are excessive and unreasonable. The Commission should direct that the “percentage of remaining revenue” in SBC’s multi- year contracts and tariffed calling plans for Usage, Centrex and Data services for business customers should not exceed 25%. (TDS Metrocom Ex. 1.5, p. 8)

(3) The Commission should direct (consistent with Finding (10) of the *ASCENT* Order) that for any multi- year contracts or tariffed plans with termination liability provisions, SBC should provide to a CLEC a calculation of the termination liability to which a business customer taking service under the contract or tariffed plan would be subject if the customer terminated the contract or plan, upon presentation by the CLEC of written authorization from the customer to request and receive the termination charge calculation. ² (TDS Metrocom Ex. 1.5, pp. 8-9)

(4) The Commission should order SBC to reimburse TDS Metrocom for its external legal and other out-of-pocket costs of this proceeding, as authorized by Section 13-516(a)(3) of the PUA. (220 ILCS 5/13-516(a)(3)), even if the Commission declines to grant the relief requested by TDS Metrocom as summarized above, and essentially ratifies SBC Illinois’ revised termination liability provisions.

As fully explained in its Initial Brief, Staff’s primary recommendation to the Commission is to order and implement an industry-wide rulemaking proceeding to address the issue of termination liability provisions commonly found throughout the industry in term contracts with highly valued customers. Neither SBC nor TDS affirmatively support Staff’s rulemaking recommendation, although for different reasons. See SBC Initial Brief, at 29; TDS Ex. 1.5 (Loch Rebuttal), at 7. Staff explained in its Initial Brief that fundamental fairness concerns were a driving factor, among other favorable factors like administrative efficiencies and uniform regulation, in making its primary recommendation to the Commission. Imposing the *ASCENT* solely on SBC, while contemporaneously allowing all other carriers in the Illinois market the freedom to operate unhindered from such a Commission limitation, strikes Staff as inherently unfair. See Staff Initial Brief, at 15.

Staff, however, also offered the Commission an alternate recommendation in its Initial Brief, which was to impose the *ASCENT* methodology for calculating termination liability penalties on the SBC provided services at issue in this proceeding, if the Commission chose not to initiate an industry-wide rulemaking proceeding. Staff Initial Brief, at 13. Under its alternative recommendation to the Commission, Staff would support the relief TDS requests as listed above and as found in TDS relief items (1), (2) (an alternative request for relief), and (3). Staff takes no position on the TDS request for relief found in request (4).

II. Staff Reply To SBC

SBC summarizes its response to the TDS Complaint as follows:

SBC Illinois' current termination liability policies are reasonable and are not anticompetitive. The Company's policies are fully consistent with contract law and relevant economic principles. The marketplace for business services in Illinois is competitive as a matter of law and fact. SBC Illinois' general approach to termination liabilities is followed by virtually all other carriers and the percentage amounts that the Company charges are generally lower than those charged by its competitors. The alternative approach recommended by TDS is not more favorable to customers or competition. Accordingly, there is no basis for requiring SBC Illinois – or any other carrier – to use the TDS approach. The marketplace can and will regulate carriers' termination liability policies and the Commission should allow it to do so.

SBC Initial Brief, at 1-2.

Staff takes issue with SBC's claim that: "The alternative approach recommended by TDS is not more favorable to customers or competition." SBC Initial Brief, at 2. Staff, likewise, finds SBC's claim that "SBC Illinois' current termination liabilities are consistent with the principles set out in the *ASCENT Order*" is, at minimum, exaggerated. SBC Initial Brief, at 8. To the contrary, Staff witness, Mr. Koch, testified that SBC's revised termination liability policy would produce a more significant

termination penalty liability than would the liability calculated under the *ASCENT* methodology in almost all circumstances. Staff Initial Brief, at 11, *citing* Staff Ex. 2.0 (Koch), at 6. Because the TDS proposal is based on previous discounts received and the SBC proposal is based on forward-looking revenue commitments, the respective termination liabilities are not easily discerned. However, even at the 25% level, SBC's penalties will likely be more severe than *ASCENT* methodology penalties up until the final months of the contract term.³ Staff, accordingly, remains concerned that SBC's termination liability proposal could still have a significant negative impact on the ability of competitive carriers to obtain the business of customers on contract with SBC. *Id.*

In its Initial Brief, SBC asserts, "Although [it] would be entitled under the *ASCENT Order* to recover additional 'incremental expenses' it incurs as a result of contract termination, it elected not to do so." SBC Initial Brief, at 8. This statement, however, runs contrary to specific parameters of *ASCENT* with regard to how the termination penalty must be calculated. In the *ASCENT Order*, the Commission makes reference to and rejects Staff's proposition that SBC's termination penalties could include an amount that represents "the costs of administering the discount and collecting its repayment upon termination" – the very type of costs SBC claims a right to recover here against TDS. *ASCENT Order*, at 28. The Commission reasoned that these costs are not separately recoverable in a termination penalty because they "are already included in the costs of its services." *Id.*, at 28-29. Furthermore, the Commission concluded that "other cited cost items (e.g. advertising) are built into the rates for all [SBC] services and recovered with each unit of service sold, whether in or out of a ValueLink plan." *Id.*

³ See Staff Initial Brief, at 11-12 for an example of how the *ASCENT* methodology would result in termination liability penalties more favorable to the customer than SBC's revised termination liability policy.

SBC, therefore, is incorrect in its assumption that it has a right to add these “incremental expenses” but *graciously* declines to do so. Such an inclusion of these costs would place SBC in a better position than it would be if termination had not occurred – the ultimate goal the Commission intentionally set out to limit.

Staff also replies in opposition to SBC’s argument against Staff’s proposed industry-wide rulemaking. Although SBC agrees with Staff that “if the Commission concludes that only TDS’ approach to termination liabilities is lawful, then it should be imposed in an even-handed manner on all carriers in Illinois” and that “a rulemaking proceeding would be the appropriate means of achieving that result.” SBC Initial Brief, at 27.

SBC, however, ultimately concludes that a rulemaking is inappropriate for many reasons, including that “a rulemaking proceeding [should not] be considered a benign and costless alternative to resolving the issues raised by TDS at this time.” SBC Initial Brief, at 29. In support of this contention, SBC further argues that:

The mere fact of a rulemaking will disrupt competitive behavior in the Illinois marketplace. The rulemaking will cast a cloud over the contracting policies of every carrier in this state (other than TDS). Carriers will not know whether they can rely on their existing termination liability policies when developing customer discounts or pricing a customer-specific network. *Id.*

Staff disagrees with SBC’s speculative assessment of the likely costs of an industry-wide rulemaking. In fact, it is Staff’s position that the lack of an industry-wide rulemaking, with its attendant complaint by complaint piece-meal regulation, would be far more likely to disrupt the competitive marketplace in Illinois, to cast a cloud over the contracting policies of all Illinois carriers, and to result in an utter lack of certainty for these carriers. In other words, if the Commission were to accept SBC’s

recommendation to allow carriers to formulate their own termination liability penalties and also “allow the marketplace to discipline carriers that exceed the bounds of what customers will accept,”⁴ this will virtually ensure the results that SBC appears to most fear.

Staff also takes issue with SBC’s assertion that: “Given the fact that Staff favors the TDS approach, the record in this complaint proceeding provides a reasonable proxy for what would likely result from the rulemaking proceeding.” SBC Initial Brief, at 29-30. However, SBC’s perception of Staff’s powers of advocacy, as Staff is all too painfully aware, is far too generous and, moreover, transparently self-serving. Staff’s position in a prospective rulemaking has yet to be taken. Further, a primary purpose of an industry-wide rulemaking proceeding is for Staff to gather information from all the market participants and then to take a position based upon comprehensive market information rather than market information necessarily limited to two market participants.

SBC continues in the next sentence to state: “The only difference is that other CLECs would also weigh in on the issues.” *Id.*, at 30. Staff is not nearly as dismissive as SBC of the significance of the opportunity for all of the other carriers in Illinois (both other CLECs and ILECs) to participate in an industry-wide rulemaking proceeding that would directly address how they design and draft termination liability provisions in lucrative contracts with highly valued customers. As Staff noted in its Initial Brief, the alternative to an industry-wide rulemaking would likely result in the Commission addressing termination liability provision complaint by individual complaints, resulting in piece-meal regulation with little certainty for carriers. Staff Initial Brief, at 16. Staff,

⁴ SBC Initial Brief, at 31.

consequently, remains optimistic that all carriers have an interest in uniform regulation and will, thus, actively participate in a Commission industry-wide rulemaking.

III. CONCLUSION

WHEREFORE, for all the reasons set forth herein, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in this proceeding.

Respectfully submitted,

Illinois Commerce Commission Staff

By: /s/
One of its attorneys

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